No. _____

In The Supreme Court of the United States

FORT PECK HOUSING AUTHORITY, BLACKFEET HOUSING, THE ZUNI TRIBE, ISLETA PUEBLO HOUSING AUTHORITY, PUEBLO OF ACOMA HOUSING AUTHORITY, ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY, NORTHWEST INUPIAT HOUSING AUTHORITY, BRISTOL BAY HOUSING AUTHORITY, ALEUTIAN HOUSING AUTHORITY, CHIPPEWA CREE HOUSING AUTHORITY, AND BIG PINE PAIUTE TRIBE,

Petitioners,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; BEN CARSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT; DEBORAH A. HERNANDEZ, ASSISTANT SECRETARY FOR PUBLIC AND INDIAN HOUSING; GLENDA GREEN, HUD'S OFFICE OF GRANTS MANAGEMENT, NATIONAL OFFICE OF NATIVE AMERICAN PROGRAMS, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF PUBLIC AND INDIAN HOUSING,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an action for the restoration of grant in aid funds illegally recouped by the United States constitutes a suit for specific relief such that the United States' sovereign immunity is waived pursuant to the Administrative Procedure Act, 5 U.S.C. § 702, or whether it is a suit for money damages, barring relief in the federal district courts.

CORPORATE DISCLOSURE STATEMENT

There are no corporate entities.

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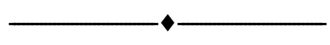
PETITION FOR WRIT OF CERTIORARI

Fort Peck Housing Authority, Blackfeet Housing, the Zuni Tribe, Isleta Pueblo Housing Authority, Pueblo of Acoma Housing Authority, Association of Village Council Presidents Regional Housing Authority, Northwest Inupiat Housing Authority, Bristol Bay Housing Authority, Aleutian Housing Authority, Chippewa Cree Housing Authority, and Big Pine Paiute Tribe petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.



OPINIONS BELOW

The revised opinion of the Tenth Circuit Court of Appeals on rehearing is reported at 881 F.3d 1181. The Panel's prior opinion is reported at 864 F.3d 1212. The United States district court's opinion regarding all Petitioners is reported at 2014 WL 901399. The district court's additional opinion regarding Petitioners Blackfeet Housing, the Zuni Tribe, Isleta Pueblo Housing Authority, Pueblo of Acoma Housing Authority, Association of Village Council Presidents Regional Housing Authority, Northwest Inupiat Housing Authority, Bristol Bay Housing Authority, Aleutian Housing Authority, Chippewa Cree Housing Authority, and Big Pine Paiute Tribe ("Blackfeet Housing, et al.") is reported at 2015 WL 232098. The district court's additional opinion regarding Petitioner Fort Peck Housing Authority

("FPHA") is unreported and is contained in the appendix hereto.

JURISDICTION

The Tenth Circuit opinion on rehearing was entered on December 22, 2017. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1). The Tenth Circuit decision stemmed from an appeal by the United States of district court judgments issued on January 16, 2015.

RELEVANT STATUTORY PROVISIONS

5 U.S.C. § 702 states:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States:

> Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

28 U.S.C. § 1491(a) states:

> (1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.
>
> (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to

> any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6[1] of that Act.

STATEMENT OF THE CASE

This case and a companion case for which a petition for a writ of certiorari will be filed, *Lummi Tribe of the Lummi Reservation, Washington, et al. v. United States*, 870 F.3d 1313 (Fed. Cir. Sept. 12, 2017, *reh'g denied* Jan. 5, 2018) (hereinafter "*Lummi*"), both present an issue that has starkly divided federal Circuit Courts and enabled the United States to argue both sides of the same coin to the detriment of non-federal parties. The issue in both cases involves the boundary

or overlap between the jurisdiction of the Federal Court of Claims and the federal district courts.

Lummi and the present matter both arose out of federal actions seeking to deprive the plaintiff tribes and tribal housing authorities of money that Congress had appropriated as part of a long-established federal grant-in-aid program. In *Lummi*, the plaintiffs brought suit in the federal court of claims based upon Tucker Act jurisdiction, and in the present case plaintiffs brought suit based upon the APA.

Congress enacted the Native American Housing Assistance and Self-Determination Act ("NAHASDA"), 25 U.S.C. §§ 4101-4243, to assist Indian tribes with providing affordable housing for tribal members. NAHASDA is a "Self Determination Act" in which Congress stressed that "[t]here exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people." NAHASDA, 25 U.S.C. § 4101(2).

Through the NAHASDA, Congress mandated that the United States provide grant in aid to tribal housing authorities through annual block grants based on a formula specified in the statute, and that tribes then have a remedy for wrongful federal denials of such funding. NAHASDA requires Indian tribes to maintain and operate homes for affordable housing purposes. These homes were constructed under NAHASDA's predecessor, the 1937 Housing Act, 42 U.S.C. § 1437bb (1988). NAHASDA further requires the United States

Department of Housing and Urban Development ("HUD") to make available sufficient funds for the continued operation and maintenance of these homes (called Formula Current Assisted Stock ("FCAS")) to meet that obligation. FCAS funding is taken off the top of the annual appropriation before other NAHASDA funding needs are met because FCAS funding is the only NAHASDA grant category for which Congress required that sufficient funds be set aside. 25 U.S.C. § 4152(b)(1) (1998).

HUD distributes NAHASDA grant funds annually to participating tribes. Consistent with NAHASDA's principle of self-determination, once funds are distributed, HUD can only recapture funds where a tribe "failed to comply substantially" with 25 U.S.C. § 4161(a)(1), or where recipients are found to have violated the conditions of 25 U.S.C. § 4165. HUD published final rules for NAHASDA in 1998. 63 Fed. Reg. 12334. 24 C.F.R. § 1000.532(b) required HUD to provide grant recipients an opportunity for a fair adjudicatory hearing before grant funds could be recaptured (i.e., recouped) under NAHASDA, 25 U.S.C. §§ 4161 or 4165. Pursuant to 24 C.F.R. § 1000.530, HUD must give tribes the opportunity to take corrective action before funds could be recaptured under 24 C.F.R. § 1000.532.

The amount of NAHASDA funds that each tribe is to receive under this statute is determined by a mathematical formula. As relevant here, the amount required to be allocated to a tribe is capable of exact

calculation based upon that tribe's number of eligible housing units i.e., FCAS.

The United States had calculated the amount it was required to provide to each Petitioner, and it then provided those funds to each Petitioner. The United States subsequently unilaterally, and in a manner contrary to statute, recalculated the number of eligible housing units, and for each Petitioner it adjusted the number of eligible units, and therefore the amount of payment allegedly due to each Petitioner, downward.

Beginning in 2001, HUD began issuing letters to tribes, including Petitioners, which received FCAS funding, informing those tribes that, based upon its unilateral downward adjustments in the number of eligible housing units, HUD would be recapturing funds that had been allegedly overpaid in past funding years. Over the course of Fiscal Years 2001 through 2007, Respondents unlawfully recouped grant funds from Petitioners through recapture and reduced payments to Petitioners.

A. District Court proceedings

Petitioners, as well as a number of other tribes and tribally designated housing entities, filed separate suits in the United States District Court for the District of Colorado under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., and NAHASDA, 25 U.S.C. § 4101 et seq. Petitioners sought orders requiring the United States to give them back their money. Petitioners further alleged that the process

used by the agency to recalculate the number of eligible units and to recouped associated grant funds violated the NAHASDA. The District Court "coordinated" briefing in the cases.

In the Blackfeet Housing, et al. action, the district court found that NAHASDA required HUD to conduct a hearing prior to its recapture of grant funds, and that its recapture of grant funds without the hearing required by NAHASDA was arbitrary and illegal. The court ordered HUD to restore the illegally recaptured funds and to refrain from threatening recapture or recapturing any grant funds awarded through fiscal year 2008. The court held that it had authority to grant such relief under the APA, finding that the waiver of sovereign immunity from section 702 of the APA applied because Petitioners sought specific relief rather than compensatory or substitute relief. *Blackfeet Hous., et al.*, No. 07-cv-01343-RPM, App. at 112-113 [2015 WL 232098, at 2-3] (D. Colo. Jan. 16, 2015); *Blackfeet Hous., et al.*, App. at 99. The court ordered Respondents to restore the illegally recouped funds from "all available sources." App. at 112-113. 2015 WL 232098, at 3.

In the FPHA action, the district court found that HUD's exclusion of certain housing units was arbitrary and capricious. As in Blackfeet Housing, et al. action, the district court held that it had authority under the APA to order HUD to restore funds illegally recaptured from FPHA because FPHA's request for monetary relief was not a claim for damages. App. at 99. *Fort Peck Hous. Auth.*, No. 05-cv-00018-RPM, 2014 WL 901399, at 4 (Mar. 7, 2014). As it did in the FPHA

action, the district court ordered HUD to restore the illegally recaptured funds from "all available sources." App. at 80.

In its March 7, 2014 memorandum opinion and order for both the Blackfeet Housing, et al. and FPHA actions, the district court found that Petitioners' "request for monetary relief is not a claim for damages for breach of a legal duty. Rather, [Petitioners] are seeking the return of funds that were taken from them and to which they remain entitled." App. at 101.

B. Circuit Court proceedings

The United States appealed all of the district court decisions to the United States Court of Appeals for the Tenth Circuit and the cases were consolidated under the lead case, *Modoc Lassen Indian Hous. Auth. v. United States Dep't of Hous. and Urban Dev.*, 881 F.3d 1181, 1195 (10th Cir. 2017). In a single opinion, a divided panel determined that: 1) HUD lacked authority to recapture the alleged overpayments (affirming the district court); but that 2) the district court lacked authority to order the United States to return the funds unless the recaptured funds are still in HUD's possession (reversing the district court and remanding for further factual findings). Describing Petitioners' win as "largely a hollow one," the divided panel held that the district court "awarded Tribes money damages in violation of § 702." 881 F.3d at 1195. The panel stated that "[t]he phrase 'money damages' 'refers to a sum of money used as compensatory relief. Damages are given

to the plaintiff to *substitute* for a suffered loss, whereas specific remedies "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled."'" *Id*. at 1195 (citing *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999)) (emphasis in original). The majority held that:

> to the extent that HUD has already distributed the funds from those yearly appropriations to other tribes, HUD can't possibly return those funds to the Tribes. Thus, the district court instead ordered HUD to pay the Tribes by 'substitute[ing]' *other* funds for the funds to which the Tribes are actually entitled – i.e., funds from past- or future-year NAHASDA appropriations.

Id. at 1196 (emphasis omitted) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988)).

The majority concluded that, "to the extent the district court ordered HUD to repay the Tribes 'from all available sources' . . . we hold that those orders constitute awards of money damages unless HUD had at its disposal sufficient funds from the relevant yearly appropriations." 881 F.3d at 1198.

Judge Matheson dissented from this part of the majority's holding, opining instead that the majority decision was inconsistent with *Bowen*. Like *Bowen*, said the dissent, "the Tribes have sued as statutory beneficiaries to enforce a mandate for the payment of money by the federal government. This is not a suit for damages, § 702's waiver applies, and sovereign

immunity poses no bar." 881 F.3d 1202. The dissent reasoned that:

> using different dollars to satisfy the Tribes' specific entitlement does not make the Tribes' relief substitutionary . . . the function of the remedy determines whether it is specific or substitutionary. The Tribes are requesting specific relief because, just like in *Bowen*, they seek enforcement of "the statutory mandate itself, which happens to be one for the payment of money." 487 U.S. at 900. In *Bowen*, Massachusetts was not asking to recover the exact same dollars the government had refused to pay it. Any dollars would do. See id. at 884 n.3, 887 nn. 8-9 (noting it was unclear what had happened to the particular Medicaid funds).

881 F.3d at 1202.

According to the dissent, "When a plaintiff is entitled to a sum of money, receipt of money totaling that sum brings the plaintiff the very thing to which it is entitled. Fungible money does not 'substitute' for other money. Money *is* money." *Id.* at 1203 (emphasis in original).

REASONS FOR GRANTING THE PETITION

"Nothing is more wasteful than litigation about where to litigate, particularly when the options are all courts within the same legal system that will apply the same law." *Bowen*, 487 U.S. at 915 (Scalia, J., dissenting). In *Bowen*, this Court was seeking to prevent

wasteful litigation stemming from the unclear jurisdictional boundaries between the federal court of claims and the federal district courts.

In his dissent in *Bowen*, Justice Scalia predicted that the majority decision would exacerbate, not solve, the problem. This case and *Lummi* illustrate that in this regard Justice Scalia was correct. While there were three separate opinions in *Bowen*, all of the Justices agreed that at least one court would have jurisdiction to grant complete relief to a party wronged by federal refusal to provide grant in aid funding. 487 U.S. at 915 (Justice Scalia discussed that he and the majority agreed that there is not "a gap in the scheme of relief – an utterly irrational gap which we have no reason to believe was intended"). But, as the present matter and *Lummi* illustrate, the circuit courts disagree in their interpretations of *Bowen*, and that disagreement results in the "utterly irrational gap," contrary to congressional intent and contrary to what this Court intended when it decided *Bowen*.

Either the Federal Circuit, in *Lummi*, or the Tenth Circuit in the *Blackfeet* and *Fort Peck* cases, was wrong.[1] The Federal Circuit itself noted that it and the

[1] While the key point for current purposes is that at least one of the two circuit courts is wrong, the tribe notes that its position is that both courts were wrong. In matters like the present, there is actually an overlap between the jurisdiction of the federal circuit and the jurisdiction of the district courts. In other words, an APA action seeking specific relief in the form of the payment of money does not necessarily oust the court of federal claims from asserting jurisdiction to issue a naked money judgment under the Tucker Act.

majority opinion in the Tenth Circuit were in disagreement, *Lummi* at 1319, but each court has steadfastly concluded that it was right and the other circuit wrong. This Court should grant certiorari and determine which circuit is right.

HUD unlawfully "recaptured" funds from Petitioners and other tribal housing entities, and unlawfully refused to restore that money to Petitioners and other tribal housing entities. In the present matter and in *Lummi*, the plaintiff tribes pled their claims related to this unlawful federal action consistent with the jurisdictional divide explicated in *Bowen*. In *Lummi*, the plaintiffs brought suit for money damages only, they did not seek the types of equitable relief which the court of federal claims cannot provide.[2] In the present case plaintiffs brought suit in 2007 primarily based upon the APA seeking both a restoration of the illegally recouped funds and prospective injunctive relief to bar the government from continuing its unlawful conduct. Plaintiffs then litigated for seven years, and prevailed in both of the trial courts. But the United States appealed from both sets of trial court decisions, and made

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[2] The Lummi plaintiffs filed suit after NAHASDA was amended, as was expressly allowed by 25 U.S.C. § 4152(b)(1)(e) (2009). The suit was filed in the court of claims because at the time the district court in the FPHA action held that it had no jurisdiction under the APA to order the restoration of the funds because the remedy constituted money damages. *Fort Peck Hous. Auth. v. United States HUD*, 2006 U.S. Dist. LEXIS 53203, *4-5 (D. Colo. 2006). The district court later reversed itself in the action that is the subject of this proceeding.

inconsistent arguments in both courts, *Lummi* at 1319, and the United States somehow then won in both courts of appeals.

This case and a companion case for which the Lummi Tribe will be petitioning for certiorari in early April, 2018, present an issue of supreme importance in which there is divergence among federal circuit courts. In fact, the decision of the Tenth Circuit and the decision of the federal circuit in *Lummi* are in conflict with each other, and at least one of the two is in conflict with *Bowen*.

Moreover, the United States has been permitted to exploit the inconsistency among the circuits to evade its responsibilities to the detriment of federal grant recipients. *Lummi* at 1319 (referring to the proceedings in the Tenth Circuit below, the Federal Circuit stated that "the government has taken, essentially, the opposite position in at least one of our sister circuits in parallel litigation"). This issue must be resolved because it directly impacts a program that is crucial throughout Indian country to providing safe, affordable homes to tribal members, and because it impacts numerous other matters where the lack of clarity between district court and court of claims jurisdiction results in years of wasteful litigation on jurisdiction. Moreover, the decisions insulate the United States from liability for wrongful withholding or recoupment of federal grant in aid funds, potentially affecting all grant in aid recipients.

The issue presented in merits briefing to this Court in this case will be difficult. It has divided the lower courts, and has even resulted in multiple dissenting and concurring decisions in the Tenth Circuit decision below. Similarly, in *Bowen*, this Court was divided.

But the issue in this petition for a writ of certiorari is, therefore, simple: should this Court grant certiorari to provide much needed clarity and to resolve the existing conflict between the circuits, by clarifying what it meant in *Bowen*.

In effect, the Federal Circuit is attempting to pass the buck to the other circuits, while the Tenth Circuit is attempting to pass it back, resulting in what the Federal Circuit court previously and accurately referred to as a "jurisprudential Flying Dutchman." *Nat'l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196, 199 (Fed. Cir. 1997). The tribes and tribal organizations in the present matter, and more generally plaintiffs seeking to navigate these contradictory decisions have been made unfortunate passengers on that Flying Dutchman.

1. A Clear Split Exists Among the Circuits Regarding the Proper Jurisdiction to Hear Claims for the Unlawful Recoupment of Federal Grant in Aid Funds.

In *Bowen v. Massachusetts*, 487 U.S. 879 (1998), this Court considered "whether a federal district court has jurisdiction to review a final order of the Secretary of Health and Human Services refusing to reimburse

a state for a category of expenditures under its Medicaid program." *Id*. at 882. The state of Massachusetts had brought actions in federal district court seeking to overturn the Department of Health and Human Services' ("HHS") decision that certain services provided by the state did not qualify for reimbursement under the Medicaid program. The district court found in HHS' favor but was reversed by the court of appeals, which held that the district court lacked jurisdiction to order the Secretary of HHS to pay money to the state. The circuit court affirmed the district court's declaratory judgment in the state's favor but vacated the "money judgment." In its review of the case, this Court concluded that the district court did have jurisdiction over the cases based on "the plain language of the relevant statutes, their legislative history, and a practical understanding of their efficient administration." *Id*. at 883.

In *Bowen*, as here, "[t]he basic jurisdictional dispute is over the meaning of the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704." *Id*. at 891. This Court found that court-ordered payment of money by the federal government to the state under these circumstances was not "money damages," thus the district court's orders were not excepted from 5 U.S.C. § 702's grant of the power of judicial review by the limitations imposed by 5 U.S.C. § 704. *Id*. at 910. The Court further found that the district court's orders were for specific relief rather than money damages, thus the waiver of sovereign immunity found in 5

U.S.C. § 702 did not preclude the district court from issuing them. *Id*.

This Court's decision in *Bowen* noted that the 1976 amendment to 5 U.S.C. § 702, which added the restriction limiting waiver of the United States' sovereign immunity to cases "seeking relief *other than money damages*" (emphasis added), "was intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment. . . ." *Id*. at 892.

In a lengthy and pointed dissent, Justice Scalia, along with Chief Justice Rehnquist and Justice Kennedy, disagreed with the majority's holding. The dissent concluded that, because the Claims Court's jurisdiction is limited to awarding damages, not specific relief, application of the majority's ruling would result in the deprivation of Claims Court jurisdiction over the vast majority of its cases.

As discussed in detail above, the Tenth Circuit interpreted *Bowen* to preclude District Court jurisdiction over claims that it characterized as money damages.

In *Lummi Tribe of the Lummi Reservation, Washington, et al. v. United States*, 870 F.3d 1313 (Fed. Cir. 2017), the Federal Circuit interpreted *Bowen* to bar court of federal claims jurisdiction over an action seeking repayment of illegally recouped grant in aid funds. The Federal Circuit court overturned the Claims Court's ruling that the plaintiffs' claims were cognizable under the Tucker Act, 28 U.S.C. § 1491. Describing the action as one for equitable relief, the circuit court

dismissed the action for lack of subject matter jurisdiction.

The Federal Circuit held: "The Tucker Act itself does not create a substantive cause of action; in order to come within the jurisdictional reach and the waiver of sovereign immunity in the Tucker Act, a plaintiff must identify a separate source of substantive law that creates a right to money damages." *Id*. at 1317. Quoting *Blueport Co., LLC v. United States*, 533 F.3d 1374, 1383 (Fed. Cir. 2008), the court explained that a "statute is money mandating if either: (1) 'it can be fairly interpreted as mandating compensation by the Federal Government for . . . damages sustained'; or (2) 'it grants the claimant a right to recover damages either expressly or by implication.' " *Lummi*, 870 F.3d at 1317. Emphasizing that the grant funding has strings attached and could potentially be later reduced or "clawed back," the court found that because "the only alleged harm is having been allocated too little in grant funding," the tribes were "not entitled to an actual payment of money damages, in the strictest terms. . . ." *Id*. at 1318. It found that because the claims were for "strings-attached NAHASDA grants," the tribes were seeking equitable relief.

The Federal Circuit, however, expressed "severe misgivings about the incongruency of [the government's] stances in this and related litigation. In particular, it appears that the government has taken, essentially, the opposite position in at least one of our sister circuits in parallel litigation," referring to the Tenth Circuit's opinion in the instant case. *Id*. at 1319.

This ability of the government to argue either side of this issue to its advantage and prevail is precisely why, in the interest of justice, this Court must resolve this issue.

The Federal Circuit instructed the Claims Court to dismiss the action for lack of subject matter jurisdiction, finding that "[o]f the government's two faces, we find the one presented to the Claims Court – the one arguing that this 'is not a suit for Tucker Act damages' – to be the correct one." *Id*. at 1321 (quoting Appellant Br. 42).

As noted above, determining which of the "two faces" that the United States has presented is correct is a difficult legal issue. It is also an important legal issue, and one that this Court should resolve.

2. This case presents a question of exceptional importance.

As discussed above, the lack of clarity on the jurisdictional divide between the Court of Claims and the federal district courts creates substantial hardships on litigants. Petitioners here have had to litigate for ten years now. And as dramatically illustrated in the present matter, it allows the United States to exploit the uncertainty to obtain inconsistent results.

The Tenth Circuit and the Federal Circuit both believe they are right. Litigants should not have to be caught in the middle. This is exactly the type of case for which a writ of certiorari should be granted,

because only this Court can resolve the issue and provide the needed clarity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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